WISCONSIN SUPREME COURT CALENDAR
AND CASE SYNOPSES
February 2005

This calendar contains cases that originated in the following counties:
Eau Claire
Grant
Green Lake
Jefferson
Milwaukee
Outagamie
Washburn
Waukesha
Wood

These cases will be heard in the Wisconsin Supreme Court Hearing Room, 231 East Capitol.

TUESDAY, FEBRUARY 1, 2005

9:45 a.m.	03-2194	Tracy Osterhues, et al. v. Board of Adjustment, et al.
10:45 a.m.	03-1528	Steven Thomas v. Clinton L. Mallett, et al.
1:30 p.m.	03-1813	Lawrence A. Kruckenberg v. Paul S. Harvey

WEDNESDAY, FEBRUARY 2, 2005

9:45 a.m.	03-1527	Gary Hanneman v. Craig Boyson, D.C.
10:45 a.m.	03-0173	Dawn Sukula, et al. v. Heritage Mut. Ins. Co., et al.
1:30 p.m.	03-1391	Menard, Inc. v. Liteway Lighting Products

THURSDAY, FEBRUARY 3, 2005

9:45 a.m.	03-2001	Department of Corrections v. David H. Schwarz, et al.
10:45 a.m.	03-3081	Milwaukee Police Assoc., et al. v. Nannette H. Hegerty, et al.
1:30 p.m.	03-1333-D	OLR v. Jay Andrew Felli

FRIDAY, FEBRUARY 4, 2005

9:45 a.m.	03-0634	Grant County DHS v. Unified Board of Grant & Iowa Counties
10:45 a.m.	04-0740	Progressive Northern Ins. Co. v. Richard P. Romanshek, et al.
1:30 p.m.	03-0288	Jane E. Chen v. John J. Warner

TUESDAY, FEBRUARY 8, 2005

9:15 a.m.	03-1184-D	OLR v. Richard Bolte
10:15 a.m.	03-2518-D	OLR v. Jeffrey A. Reitz

WEDNESDAY, FEBRUARY 16, 2005

9:00 a.m.	00-2590-CR	State v. Matthew J. Knapp

WISCONSIN SUPREME COURT
TUESDAY, FEBRUARY 1, 2005
9:45 a.m.

03-2194 Tracy Osterhues, et al. v. Board of Adjustment, et al

This is a review of a decision of the Wisconsin Court of Appeals, District III (headquartered in Wausau), which reversed an order of the Washburn County Circuit Court, Judge Robert H. Rasmussen presiding.

This case involves a group of Spooner residents who have, for four years, challenged a proposal to construct a 40-acre gravel pit and hot-mix asphalt facility near their homes. The question before the Supreme Court is whether these individuals are entitled to a new hearing by the Washburn County Board of Adjustment following the zoning committee's decision to grant the gravel pit permit.

Here is the background: Tracy and Damian Osterhues and two other couples live near Hy. 53 in Spooner where, for years, a small gravel pit has operated in the mostly residential area. In early 2001, the Washburn County Highway Department purchased a 40-acre parcel of land in the neighborhood with the intention of building a large gravel pit and hot-mix asphalt facility – a so-called "non-metallic mine."

In order to construct the facility, the highway department needed a conditional-use permit. The county's zoning committee held two hearings on this permit in summer 2001 and ultimately approved it over the strenuous objections of the neighbors.

After their loss, the neighbors appealed to the Washburn County Board of Adjustment, asking it to conduct a *de novo* hearing, which would allow both sides to present all their evidence. The Board's attorney, however, advised the Board that it did not have the authority to hear a case *de novo*. The attorney explained that the Board only had the power to reverse the decision of a zoning committee if it determined that the committee had made an error. In that situation, the Board would then send the case back to the zoning committee for a do-over. Acting on the advice of its counsel, the Board did not conduct a new hearing, and, finding no errors, affirmed the zoning committee.

The neighbors went to court and the judge concluded that the Board did have the authority to conduct a *de novo* hearing and he ordered it to do so. The Highway Department appealed, and the Court of Appeals reversed the circuit court, noting that the statute that grants powers to zoning boards of adjustment[1] uses the word "appeal" rather than *de novo*, and concluding that the Legislature's word choice means that these boards are designed to review for correctness rather than to re-decide matters.

Now the petitioners have come to the Supreme Court noting that the Court of Appeals ruling in this case conflicts with a prior Court of Appeals decision[2] and with a 22-year-old Supreme Court decision.[3] The respondents, on the other hand, argue that if zoning boards of appeal have the power to conduct *de novo* hearings on administrative decisions, then they have broader powers than the state's courts. The Supreme Court will now clarify the jurisdiction and powers of zoning boards of appeal.

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[1] Wis. Stat. § 59.694 (7) and (8)
[2] Wolff v. Grant County Board of Adjustment, 2002 WI App 85, 252 Wis.2d 766 (Ct. App. 2002)
[3] League of Women Voters v. Outagamie County, 113 Wis. 2d 313, 334 N.W. 2d 887 (1983)

WISCONSIN SUPREME COURT
TUESDAY, FEBRUARY 1, 2005
10:45 a.m.

03-1528 Steven Thomas v. Clinton L. Mallett, et al.

This is a review of a decision of the Wisconsin Court of Appeals, District I (headquartered in Milwaukee), which affirmed a ruling of the Milwaukee County Circuit Court, Judge Timothy G. Dugan presiding.

This case involves lead-paint poisoning. The Supreme Court will decide whether manufacturers such as Sherwin-Williams Co., ConAgra, and others may be held liable under what is known as the "risk contribution theory" for the harm caused by lead paint.

Here is the background: Steven Thomas is a minor who suffers from mild mental retardation and several neurological conditions allegedly caused by his ingestion of lead-paint dust and chips in two homes (built in 1900 and 1905) where he lived when he was very young. He already settled with the homeowners (for a total of about $325,000) and their liability is no longer at issue.

Although the federal government has banned the use of lead-pigment paints in residences since 1978, the Centers for Disease Control estimates that millions of children live in older homes with lead paint. Lead poisoning can lead to numerous physical and mental ailments and can cause death.

Thomas cannot trace the lead paint that poisoned him, so he seeks to sue all companies that manufactured the key ingredient. He contends that this group of companies conspired over the years to conceal dangers and proposes that he be allowed to sue under the "risk contribution theory," which the Wisconsin Supreme Court first articulated in a case[1] involving the drug DES that caused major health problems but could not often be traced to an individual manufacturer. This theory says that an individual who cannot trace his/her injuries to a specific company still may collect damages if s/he can prove: (1) that s/he was exposed to a dangerous product; (2) that the product caused his/her injuries; (3) that the defendant marketed or produced the product; and (4) that the defendant breached a legally recognized duty by producing/marketing the product.

Thomas' effort to make a case using the risk contribution theory was unsuccessful in the lower courts. The trial court concluded that Thomas' situation was not analogous to a case based upon DES damages because Thomas had (in the homeowners) another avenue to collect damages. The Court of Appeals affirmed, writing:

> Although undoubtedly Thomas would like to have additional 'deep pockets' to plumb, on top [of the settlement with the homeowners], he is not entitled to the exact remedy he might prefer….

In a case that is expected to have statewide impact, the Supreme Court now will decide whether to extend the risk contribution theory of liability to lead paint manufacturers.

[1] Collins v. Eli Lilly Co., 116 Wis. 2d 166, 342 N.W.2d 37 (1984)

WISCONSIN SUPREME COURT
TUESDAY, FEBRUARY 1, 2005
1:30 p.m.

03-1813 Lawrence A. Kruckenberg v. Paul S. Harvey

This is a review of a split decision of the Wisconsin Court of Appeals, District II (headquartered in Waukesha), which affirmed a judgment of the Green Lake County Circuit Court, Judge William M. McMonigal presiding.

This case involves an erosion problem caused by a drainage ditch that a man dug on his neighbor's property. The question before the Supreme Court is whether the neighbor is barred from suing because the person who sold him the property already had sued and reached a settlement with the digger.

Here is the background: In 1982, Paul S. Harvey dug a ditch on the northern edge of what he assumed to be his land. The ditch caused the fence between Harvey's lot and that of his neighbor, Donald A. Czyzewski, to collapse. It also caused erosion on Czyzewski's land and lowered the water table. Much later, after Czyzewski had sold the land, it came to light that the ditch actually was dug not on Harvey's property, but on Czyzewski's.

Czyzewski sued Harvey over the erosion issue and the two reached a settlement. Harvey agreed to pay $1,500 and plant rye grass along the ditch and Czyzewski agreed to drop his lawsuit.

Shortly after this settlement, Lawrence A. Kruckenberg, who was in the dark about the dispute, purchased Czyzewski's property. In 2001, after a land survey revealed that the ditch was on his property, Kruckenberg began a lawsuit of his own, alleging that Harvey had dug the ditch on his land and caused erosion. Kruckenberg sought damages for trespass and conversion and a judgment declaring the location of the property line.

The circuit court dismissed Kruckenberg's claim based upon the doctrine of claims preclusion, which attempts to limit lawsuits and underscore the finality of court decisions by prohibiting a party from bringing a series of lawsuits in order to raise related claims.

Kruckenberg appealed, arguing that he hadn't been part of, or even known about, the previous lawsuit, and that his current claims involving the property line had not been raised. The Court of Appeals – in a split decision – agreed that his claim was barred because of the previous property owner's lawsuit. The court concluded that it is not necessary for the exact claim to have been litigated previously; as long as it could have been litigated, it is prohibited. It would be unfair to Harvey, the majority concluded, to reopen this dispute after he, in good faith, agreed to the settlement.

Dissenting, Judge Neal Nettesheim argued that the majority opinion is unfair to Kruckenberg as it bars him from a court decision on the location of his property line even though that issue was never litigated.

The Supreme Court will determine whether Kruckenberg's claim is prohibited because the previous landowner already sued and settled a claim involving this strip of land.

WISCONSIN SUPREME COURT
WEDNESDAY, FEBRUARY 2, 2005
9:45 a.m.

03-1527 Gary Hanneman v. Craig Boyson, D.C.

This is a review of a decision of the Wisconsin Court of Appeals, District II (headquartered in Waukesha), which affirmed in part and reversed in part of a decision of the Outagamie County Circuit Court, Judge Harold V. Froehlich presiding.

This is a chiropractic malpractice case. The Supreme Court will decide whether chiropractors must share with their patients the same type of information about treatment risks that medical doctors are required to share.

Here is the background: Gary Hannemann received regular chiropractic adjustments from Craig Boyson, D.C. On Aug. 21, 1997, Boyson adjusted Hannemann's spine with a move that included a neck twist. Hannemann was in pain following the procedure and, the next day, one of his legs started to "act up." He called Boyson and went in for another adjustment. Boyson later testified that he urged Hannemann to go to the emergency room; Hannemann said that conversation never occurred. Early the following morning, Hannemann awoke to find that he was paralyzed on one side. A neurosurgeon determined that he had had a stroke.

Hannemann's stroke left him permanently and significantly disabled. He sued Boyson. At trial, experts disagreed about the cause of Hannemann's stroke. Hannemann's expert witnesses pinned it on the chiropractic adjustment while Boyson's witnesses testified that an earlier bout with meningitis was to blame.

During the trial, experts testified that there is a well-known relationship between chiropractic adjustments and neurovascular injuries including stroke. The experts disagreed, however, on the size of the risk, with some estimating that injuries might occur in 55 out of 177 patients and others maintaining that one in 400,000 patients or even fewer might experience this type of injury. Boyson acknowledged that he never informed Hannemann that there was a risk of stroke associated with cervical spine adjustment. He explained that he tried not to alarm patients by disclosing rare risks because he felt that they might decline to proceed with treatments that would benefit them.

The jury ultimately found Boyson negligent and awarded Hannemann $227,000. Boyson appealed, challenging the wording of the instructions that had been given to the jury. The Court of Appeals ordered a new trial after concluding that the jury should have been asked to determine not just whether Boyson had been negligent, but whether he had failed to obtain the patient's informed consent. Before the new trial could take place, Hannemann appealed this ruling to the Supreme Court.

The Supreme Court will decide if chiropractors have the same duty under the law as medical doctors to inform their patients of the risks that a reasonable person would want to know about prior to consenting to testing or treatment.

WISCONSIN SUPREME COURT
WEDNESDAY, FEBRUARY 2, 2005
10:45 a.m.

03-0173 Dawn Sukula, et al. v. Heritage Mutual Ins. Co., et al.

This is a review of a split decision of the Wisconsin Court of Appeals, District IV (headquartered in Madison), which reversed an order of the Wood County Circuit Court, Judge Frederic W. Fleishauer presiding.

This case, like a number of others the Supreme Court has handled in the past several years, arises from a car crash involving an underinsured motorist (UIM). At issue is a 2002 Supreme Court ruling in a similar case that plaintiffs John and Dawn Sukula hope to use in order to reopen the judgment against them.

Here is the background: On Oct. 2, 1996, John Sukula was injured in a motor vehicle accident while on the job. His employer's insurance policy (from Heritage Mutual) covered him but contained a reducing clause. Heritage used this clause to reduce its payment to Sukula by the amount Sukula received from his own insurer.

The Sukulas sued, arguing that the reducing clause was illegal. Heritage, they said, should not be permitted to reduce its coverage simply because they had insurance from another source. The trial court found the reducing clause valid and the Sukalas appealed. In November 2000, the Court of Appeals unanimously affirmed the trial court and the Sukalas asked the Wisconsin Supreme Court to take their case.

In April 2001, the Supreme Court denied the Sukalas' petition. Six months later, however, the Supreme Court granted review in a case[1] that raised identical issues and ultimately issued a ruling that favored the arguments that the Sukalas had made.

While the Supreme Court was handling this unrelated-but-similar appeal, the Sukalas settled with Heritage for $288,000 (the policy limit was $1 million) and with Western National Mutual Insurance Company for $76,000 (the limit was $250,000). When the Sukalas learned of the Supreme Court's decision in the similar case, they went back to the circuit court seeking to reopen their case based upon the new case law that went in their favor. The circuit court denied the motion and the Sukalas appealed.

The Court of Appeals reversed the circuit court, concluding that the interests of justice required a new day in court for the Sukalas. Dissenting, Court of Appeals Judge David Deininger expressed concern that the majority's reopening of the case "…seriously undermines the finality of judgments in Wisconsin courts…."

Both insurance companies petitioned the Supreme Court to take the case. "[W]ill this case ever end," one company wonders in its brief, "regardless of the number of final judgments that are entered or opportunities for appellate review that are exhausted, so long as the law regarding UIM clauses continues to evolve?"

The Sukalas, on the other hand, agree with the view of the Court of Appeals majority, which concluded that they were "victims of circumstance" who deserve another day in court.

[1] Badger Mutual Insurance Co. v. Schmitz, 2002 WI 98, 225 Wis. 2d 61, 647 N.W.2d 223

WISCONSIN SUPREME COURT
WEDNESDAY, FEBRUARY 2, 2005
1:30 p.m.

03-1391 Menard, Inc. v. Liteway Lighting Products

This is a review of a decision of the Wisconsin Court of Appeals, District III (headquartered in Waukesha), which reversed a judgment of the Eau Claire County Circuit Court, Judge Lisa K. Stark presiding.

This case involves damaged and/or defective merchandise that a supplier delivered to Menards, a Midwest home improvement center that is headquartered in Eau Claire. The Wisconsin Supreme Court will decide if Menards is barred from suing the supplier because the supplier already successfully sued Menards for payment of the invoices for these goods.

Here is the background: Between 1993 and 1999, Menards purchased about $18.1 million in Liteway products. Some of the products, according to Menards, arrived damaged and some were sold to customers who later found them to be defective or otherwise unsatisfactory.

This case arises from a shipment of about $355,000 worth of Liteway products. Menards did not pay the invoice for this shipment and Liteway sued Menards. When Menards failed to respond by the deadline set by the court, a default judgment was awarded to Liteway for the full amount. Menards then filed a claim against Liteway alleging that the goods had been defective. Liteway argued that the claim should be dismissed because it could have been raised as part of the initial case. The circuit court disagreed, concluding that it would be "patently unfair" to bar Menards from raising these issues in a new lawsuit.

A trial was held and the court determined that Menards was entitled to damages of about $137,000, which represented defective/unsatisfactory goods that Menards had paid for, plus shipping and storage costs for those goods.

Liteway appealed, and the Court of Appeals reversed, dismissing Menards' claim based upon the doctrine of claims preclusion, which attempts to limit lawsuits and underscore the finality of court decisions by prohibiting a party from bringing a series of lawsuits in order to raise related claims.

Now Menards has come to the Supreme Court, where it argues that the Court of Appeals decision, if allowed to stand, will have a negative impact on Wisconsin business. Menards says it is unfair to bar a purchaser from ever claiming goods are defective or returning them for a refund if the seller has sued to collect on the invoices, because the purchaser does not always know immediately that the merchandise is defective.

Liteway, on the other hand, argues that Menards missed its opportunity to pursue its claim when it failed to raise it in the initial litigation.

The Supreme Court will decide whether Menards can move forward with this claim or whether it's barred by the doctrine of claim preclusion.

WISCONSIN SUPREME COURT
THURSDAY, FEBRUARY 3, 2005
9:45 a.m.

03-2001 Department of Corrections v. David H. Schwarz, et al.

This is a review of a split decision of the Wisconsin Court of Appeals, District I (headquartered in Milwaukee), which reversed a ruling of the Milwaukee County Circuit Court, Judge Timothy G. Dugan presiding. The circuit court had reversed an administrative decision of the Division of Hearings and Appeals.

This case involves a parole violation that went undiscovered for several years. The Wisconsin Supreme Court will decide whether the state Department of Corrections (DOC) has the authority to revoke a current parole based upon the discovery of a violation during a past term of parole.

Here is the background: James Dowell was convicted on March 30, 1994, on charges related to armed robbery and auto theft. He was sentenced to 90 months in prison, paroled in 1997, and revoked from parole in 1998. He reached his mandatory release date on July 17, 2001, and was again paroled.

In May 2002, while Dowell was out on parole, he was matched to a May 1997 sex crime through DNA. The crime had occurred during his first parole. The DOC sought to revoke Dowell's current parole and have him serve the remaining two+ years of his sentence. A hearing examiner working for the Department of Administration found that Dowell's alleged crime had not violated his current term of parole and that the DOC could not reach back into prior terms of parole to revoke him.

The DOC appealed this ruling to David Schwartz, administrator of the Division of Hearings and Appeals, and Schwartz upheld the decision, concluding that state law[1] only permits revocations based upon current terms of parole. The DOC appealed to the circuit court, which reversed the administrative decisions and permitted the revocation.

Dowell appealed the circuit court decision and won. The Court of Appeals' majority concluded that a parolee cannot be revoked for an alleged violation of a prior term of parole. The majority based its conclusion upon an interpretation of the following wording in the state statute:

Wis. Stats. § 304.07(3):
…the department preserves jurisdiction over a … parolee … if it commences an investigation, issues a violation report or issues an apprehension request concerning an alleged violation prior to the expiration of the … parolee's … term of supervision. (emphasis added)

In his dissent, former Court of Appeals Judge Charles Schudson argued that the Legislature's use of the phrase "term of supervision" was not meant to refer only to the current parole term, but rather to the defendant's entire sentence.

The Supreme Court will clarify whether the DOC has the authority to revoke a person from parole for an offense that occurred during a separate parole period.

[1] Wis. Stat. 304.072(3)

WISCONSIN SUPREME COURT
THURSDAY, FEBRUARY 3, 2005
10:45 a.m.

03-3081 Milwaukee Police Assoc., et al. v. Nannette H. Hegerty, et al.

This is a review of a split decision of the Wisconsin Court of Appeals, District I (headquartered in Milwaukee), which reversed an order of the Milwaukee County Circuit Court, Judge Daniel A. Noonan presiding.

This case focuses on overtime pay for members of two Milwaukee police unions. Specifically, the Supreme Court will decide whether the union contracts require quicker compensation for overtime than the 31 days established in the state statutes.

Here is the background: The Milwaukee Police Association represents Milwaukee police officers. The Milwaukee Police Supervisors' Association represents police supervisors from the rank of sergeant to deputy inspector. In 2002, these unions sued the city of Milwaukee alleging that the city was tardy in its payment of more than $800,000 in overtime during five pay periods in 2002. The unions maintain that their collective bargaining agreements require quicker compensation for overtime than what is required by state law of all Wisconsin employers. While the contracts do not specify a schedule for overtime payment, they do indicate that they are subject to Milwaukee ordinances, which establish biweekly payment for city employees. The state statutes, on the other hand, establish the following general rule that sets the time in which an employee must be paid:

Wis. Stat. § 109.03(1):
Every employer shall as often as monthly pay to every employee engaged in the employer's business … all wages earned by the employee to a day not more than 31 days prior to the date of payment.

Another section of the law quoted above specifies that the above section does not apply to "[e]mployees covered under a valid collective bargaining agreement establishing a different frequency for wage payments."

In this case, the circuit court concluded that the unions were correct. The judge found that payment of overtime must follow the same schedule established for payment of other wages, and that this schedule is biweekly because the union contract follows the Milwaukee ordinance. The majority of the Court of Appeals, however, reached the opposite conclusion, finding that because neither the collective bargaining agreement nor the city ordinance to which it refers make specific mention of compensation for overtime, the state law establishing the 31-day wage payment window controls the payment of overtime.

Now, the Supreme Court will decide if the police unions' collective bargaining agreements require payment of overtime on the same biweekly schedule as regular wages, or whether the city may compensate police for overtime work on a less-frequent basis.

WISCONSIN SUPREME COURT
THURSDAY, FEBRUARY 3, 2005
1:30 p.m.

03-1333-D OLR v. Jay Andrew Felli

The Wisconsin Supreme Court is responsible for supervising the practice of law in the state and protecting the public from misconduct by lawyers. Lawyers must follow a code of ethics developed by the Court. When there is an allegation that a lawyer has acted unethically, the Supreme Court's Office of Lawyer Regulation investigates and, if warranted, prosecutes the attorney. A referee – a court-appointed attorney or reserve judge – hears the discipline cases and makes recommendations to the Supreme Court.

This case involves a Brookfield attorney, Jay A. Felli, who is accused of missing deadlines, not communicating with his clients, and keeping fees that he did not earn.

Here is the background: The Office of Lawyer Regulation (OLR) charged Felli with 11 counts of misconduct involving three clients. The referee who heard this case concluded that the OLR failed to prove all of the counts involving one of the clients and most of the counts involving the other two. The referee recommended discipline on just three of the 11 counts. The Supreme Court may or may not agree with this assessment.

The OLR alleges that Felli committed misconduct in the following three cases:

- A 1999 divorce case in which both the husband and wife wanted to ensure that the wife's health insurance would continue. The referee found that Felli failed to pursue a temporary order regarding the health insurance and did not appear at the divorce hearing. The OLR also alleges that Felli kept a $2,000 retainer that he did not earn.

- A 2000 case involving Medicare benefits for an elderly man who was facing possible termination of the benefit that allowed him to remain in a nursing home. Felli allegedly was slow in pursuing the benefits and the man was cut off (and died the next day). The referee concluded that Felli misrepresented to the OLR the nature and extent of his work in this case. The OLR also alleges that Felli kept a $1,500 retainer that he did not earn.

- A 2000 case involving a woman who sought Felli's assistance with her mother's estate. The woman did not pay a retainer to Felli and, because several meetings were set up and cancelled, the two never met again after her initial inquiry. Eight months later, the woman hired a different attorney who contacted Felli to ask for the file. Felli maintained that the woman had not been a client and that he never opened a file. This is the case that the referee recommended dismissing.

The OLR is seeking a one-year suspension of Felli's license; the referee recommended a three-month suspension. The Supreme Court will decide what type of discipline is appropriate.

WISCONSIN SUPREME COURT
FRIDAY, FEBRUARY 4, 2005
9:45 a.m.

03-0634 Grant County DHS v. Unified Board of Grant & Iowa Counties

This is a review of a decision of the Wisconsin Court of Appeals, District IV (headquartered in Madison), which affirmed an order of the Grant County Circuit Court, Judge Robert P. VanDeHey presiding.

This case involves a severely disabled Illinois woman with a sister in Wisconsin who is her guardian and wishes to move her to a nursing home here. The question before the Supreme Court is whether a law[1] that requires the woman to live in Wisconsin before her sister may file the petition for placement here is constitutional.

Here is the background: Jane E.P. is a woman in her late 40s who suffers from Wernicke's encephalopathy, a neurological disorder that results in global confusion, amnesia, vision problems, and other symptoms. Her disabilities mean that she requires constant attention and is incapable of living outside of a long-term care facility.

Jane was living in a Galena, Ill., nursing home when her sister – who is her guardian and lives across the border in Wisconsin – filed a petition to move her to a private facility in Cuba City, Wis. This triggered a requirement that the Unified Board of Grant and Iowa Counties, which is a joint mental-health agency, perform an evaluation. The agency concluded that, because Jane was not currently living in Wisconsin, the petition could not proceed. The circuit court agreed, dismissing the petition because the residency requirement was not met.

Jane appealed, arguing that she cannot live outside of a care facility, so moving to Wisconsin in order to establish residency prior to petitioning for placement in a facility would be impossible for her. The Court of Appeals agreed, finding that the residency requirement was illegal because it interfered with Jane's constitutional right to travel.

The counties' mental-health agency now has asked the Supreme Court to take the case, arguing that residency requirements are good public policy because they ensure that services are available for state residents and that state taxpayers are not unduly burdened. The counties further point out that Jane could have moved into a Wisconsin nursing home for a time in order to establish residency.

The Supreme Court will decide whether the Wisconsin law that requires a proposed ward to live in Wisconsin at the time a protective placement petition is filed is constitutional.

[1] Wis. Stats. § 55.06(3)(c

WISCONSIN SUPREME COURT
FRIDAY, FEBRUARY 4, 2005
10:45 a.m.

04-0740 Progressive Northern Ins. Co. v. Richard P. Romanshek, et al.

This case bypassed the Wisconsin Court of Appeals. The Supreme Court permits litigants to bypass the lower appellate courts in certain circumstances. This case began in Waukesha County Circuit Court, Judge Lee S. Dreyfus presiding.

This case involves a "miss-and-run" accident where a driver wreaked havoc by making an illegal turn, and then fled and was never found. The question before the Supreme Court is whether an unidentified motor vehicle must actually hit another vehicle before the victim may collect insurance for having been involved in a "hit-and-run."

Here is the background: On Dec. 29, 2002, Richard P. Romanshek was riding his motorcycle on a highway in Florida when a station wagon made an illegal turn in front of him. He swerved, skidded, and rolled, breaking his shoulder in three places. He required surgery and has permanent injuries. The station wagon was never found.

In a traditional hit-and-run, the automobile insurer would cover the victim's claim under the uninsured motorist provision that all Wisconsin insurance policies are required to include. Specifically, the law[1] requires coverage of at least $25,000 per person and $50,000 per accident.

The law is silent on a miss-and-run scenario such as the one presented here, and Romanshek's insurer, Progressive Northern Insurance Company, denied his claim. Romanshek sued, and the trial court dismissed his claim, concluding that the language of the statute means that physical contact must occur. Still, the judge expressed reservations:

> It would make sense that [a miss-and-run] would come within the definition of an uninsured motorist coverage, but we're not there yet … the Wisconsin Legislature hasn't done that….

The Wisconsin Supreme Court, in past cases, has declined to extend coverage meant for hit-and-run accidents to miss-and-runs[2] precisely for the reason articulated by the trial court: the Legislature could change the wording of the statute, but has not done so. However, Romanshek points out that in the 20 years since the Supreme Court last looked at this precise issue, many states have eliminated any requirement that contact occur in a "hit-and-run" accident in order to trigger coverage. According to Romanshek, 27 states now treat miss-and-runs like hit-and-runs for purposes of requiring coverage.

Progressive Northern, on the other hand, argues that the law is clear and that it's the job of the Legislature, rather than the courts, to change the law if it sees fit. The insurer also points out the Romanshek's policy clearly limited coverage to situations involving hit-and-run accidents.

The Supreme Court will decide whether Wisconsin will require insurance companies to provide coverage in situations involving miss-and-run accidents.

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[1] Wis. Stats. § 632.32(a)1

[2] Hayne v. Progressive Northern Insurance Company, 115 Wis. 2d 68, 339 N.W.2d 588 (1983)

WISCONSIN SUPREME COURT
FRIDAY, FEBRUARY 4, 2005
1:30 p.m.

03-0288 Jane E. Chen v. John J. Warner

This is an appeal of a split decision of the Wisconsin Court of Appeals, District IV (headquartered in Madison), which affirmed an order of the Wood County Circuit Court, Judge James M. Mason presiding.

This case involves a question of child support when a couple divorces and one parent opts out of the workforce. The Supreme Court will decide whether a parent's earning *capacity* or *actual income* should be used in figuring how much child support to award.

Here is the background: Jane E. Chen, M.D., and John J. Warner, M.D., were divorced in 1999 after 18 years of marriage. At the time, both were working full-time at the Marshfield Clinic, Chen as an anesthesiologist and Warner as a radiologist. Chen was earning approximately $236,000 per year and Warner was earning about $256,000.

Chen and Warner agreed to share custody and expenses for their three young daughters, and agreed that neither would ask for child support. But Chen wanted to spend more time parenting and, in 2000, after unsuccessful attempts to go part-time, quit her job. She testified that she had planned to support the children on the return on her investments, which she had estimated to be approximately $100,000 per year. However, the stock market declined dramatically and Chen in 2001 earned $32,000. She explored working part-time but testified that the only job she could find was as a "temp" doctor working out of town, which would have taken her away from her children every other week. In 2002, having worked out a budget that required $7,000 per month, she petitioned the court to order her ex-husband to pay $4,000 a month in child support.

Warner objected, arguing that Chen was shirking her duty by not working. The circuit court disagreed, and, using Chen's actual income rather than her earning potential, ordered Warner to pay $4,000 per month.

Warner appealed, arguing that if the circuit court ordered child support it would be supporting a "race to resign" – with the "winner" forcing the "loser" to continue working in order to support the family. The Court of Appeals majority rejected this argument, noting that there was no evidence Warner wanted to quit his job, and writing:

…[A] person who drops out of a career for several years to parent typically gives up substantial financial security and prestige. He or she also faces an uncertain return to the workforce…. This argument ignores the work involved in the active parenting of three young school-age children.

Now Warner has come to the Supreme Court, arguing that Chen's decision to retire at age 43 and in the face of a declining stock market was unreasonable and that she should be required to uphold her end of the child support bargain even if it means spending down her investment accounts. The Supreme Court will decide if Chen was rightfully awarded child support.

WISCONSIN SUPREME COURT
TUESDAY, FEBRUARY 8, 2005
9:15 a.m.

03-1184-D OLR v. Richard Bolte

The Wisconsin Supreme Court is responsible for supervising the practice of law in the state and protecting the public from misconduct by lawyers. Lawyers must follow a code of ethics developed by the Court. When there is an allegation that a lawyer has acted unethically, the Supreme Court's Office of Lawyer Regulation (OLR) investigates and, if warranted, prosecutes the attorney. A referee – a court-appointed attorney or reserve judge – hears the discipline cases and makes recommendations to the Supreme Court.

Richard Bolte is a 1961 law school graduate who does not currently practice law in Wisconsin; he has been on "inactive" status since 1998.

The Office of Lawyer Regulation (OLR) alleges that in 1994, Bolte, who is not licensed to practice law in Colorado, began helping a Colorado woman who was concerned that she was not receiving payments that she was due under a mineral lease with Atlantic Richfield Company, an oil company known as ARCO. She and Bolte entered into an agreement that Bolte would investigate the matter and, in exchange, he would receive monthly payments as well as a percentage of any possible recovery from ARCO. On Bolte's advice, she also hired a Colorado lawyer, but continued to receive advice and assistance from Bolte, who eventually obtained special permission to appear in the federal court proceeding in Colorado.

Eventually, the woman received a payment of $1.88 million from ARCO and she paid Bolte $388,000. She wanted him to waive his claim to a percentage of future ARCO payments and threatened to sue him for unauthorized practice of law if he refused. He refused and she sued to recover the $388,000, alleging that he had engaged in the unauthorized practice of law. She won and he was ordered to repay the money.

Following the Colorado proceeding, the Wisconsin OLR investigated Bolte and filed a complaint alleging that he engaged in the unauthorized practice of law, that he had misrepresented his "inactive" status to obtain admission to the federal court, and that his decision to transfer certain property immediately after the judgment against him was made with the intent to defraud the woman. The OLR asked that Bolte's law license be suspended for nine months.

The referee in this case concluded that Bolte acted mostly as an investigator rather than a lawyer in this case, but found that he "did, on occasion, engage in the unauthorized practice of law" and that he attempted to hide some assets in order to avoid paying his debt to the woman. The referee was not persuaded that Bolte made misrepresentations to the court to gain special admission to the Colorado bar. The referee recommended a three-month suspension. Bolte appeals, denying that he engaged in the unauthorized practice of law and tried to avoid paying the judgment against him. He notes that the property he transferred was fully mortgaged at the time. He is asking the Supreme Court to reject the referee's conclusions of law on these issues, dismiss the case, and award him costs including attorney fees for defending himself in this matter.

WISCONSIN SUPREME COURT
TUESDAY, FEBRUARY 8, 2005
10:15 a.m.

03-2518-D OLR v. Jeffrey A. Reitz

The Wisconsin Supreme Court is responsible for supervising the practice of law in the state and protecting the public from misconduct by lawyers. Lawyers must follow a code of ethics developed by the Court. When there is an allegation that a lawyer has acted unethically, the Supreme Court's Office of Lawyer Regulation (OLR) investigates and, if warranted, prosecutes the attorney. A referee – a court-appointed attorney or reserve judge – hears the discipline cases and makes recommendations to the Supreme Court.

This case involves 13 counts of misconduct against a Milwaukee lawyer who has practiced law since 1981. The Office of Lawyer Regulation (OLR) alleges that Jeffrey A. Reitz failed to act with reasonable diligence and promptness and missed deadlines in the cases that are summarized below. The referee who heard from both sides concluded that the OLR had proved all 13 counts and recommended a six-month suspension of Reitz' law license.

- In March 1998, a woman who had lost custody of her child hired Reitz' law partner to help her pursue a malpractice claim against the lawyer who had represented her in the child-custody dispute. She ended up working with Reitz, who, the OLR claims, failed to prepare the case, failed to comply with demands for information from opposing counsel, failed to find expert witnesses to testify on her behalf, and ultimately allegedly coercing her into signing a "release" indicating that she was satisfied with the firm's work and would not sue Reitz' law partner before he would agree to go ahead with a deposition that he told her was necessary for her case. Eventually, a court dismissed the woman's lawsuit and ordered her to pay the legal fees of the attorney whom she had sued.

- In June 1998, a woman who was injured in a car accident with a cab driver hired Reitz' law partner. Reitz was eventually given the case. The OLR alleges Reitz lied to the woman about his work on the case and did not return her calls. Three-and-a-half years after the accident, the woman filed a grievance with the OLR and settled her dispute with Reitz for $2,000.

- In July 1998, a man who had been injured in a motorcycle accident hired Reitz' law partner and the case was eventually given to Reitz. According to the OLR, Reitz failed to pursue the man's personal injury claim in a timely manner and failed to keep the man informed of the status of his case.

- In September 1999, a woman who had been involved in a five-car collision on I-94 hired Reitz to represent her in a personal injury case. The OLR alleges that Reitz told the woman he had filed a lawsuit against the insurance company but never did so. In

December 2001, after more than two years of trying to work with Reitz, the woman hired a new lawyer.

- In October 1999, a woman who had been injured on the job hired Reitz to represent her on a worker's compensation claim. The woman claims that Reitz did not return phone calls and failed to meet deadlines in her case. In 2001, the Department of Workforce Development dismissed the woman's claim because of failure to file medical records.

- Also in October 1999, a man who was injured when he rolled off his motorcycle to avoid being hit by a truck hired Reitz to represent him. Because the man was represented by a different attorney at the time, Reitz had to file paperwork with the court to take over the case. The OLR alleges that he failed to do this, and that the case was dismissed in May 2001 because of this inaction.

Reitz disputes four of the counts against him. He maintains that preparing the "release" for the signature of the first client, an act that he calls "stupid and shortsighted," did not amount to an ethics violation. He also takes issue with several of the other clients' recollections of various communications or lack thereof.

The referee has recommended a six-month suspension; Reitz is asking the Court to consider a suspension of two to four months. The Court will decide what discipline to impose on this attorney.

WISCONSIN SUPREME COURT
WEDNESDAY, FEBRUARY 16, 2005
9 a.m.

00-2590-CR State v. Matthew J. Knapp

The Wisconsin Supreme Court first heard this case on April 23, 2003 and issued its opinion on July 22, 2003. A year later, after issuing a ruling that changed the landscape in a similar case, the U.S. Supreme Court granted review in this matter and vacated the state court's decision, sending the case back to Wisconsin for further consideration based upon the updated caselaw. This case began in Jefferson County Circuit Court, Judge Randy R. Koschnick presiding.

This case involves a 1987 murder and a bloodstained sweatshirt that prosecutors hope to use as evidence against the defendant, Matthew J. Knapp. As noted above, the state Supreme Court originally heard Knapp's case in 2003 and ruled in a split decision[1] that the sweatshirt must be suppressed from evidence because it was seized based upon statements that Knapp – who had not been given a Miranda warning – made to police. This ruling overturned a decision by the circuit court.

About a year after the state Supreme Court issued this ruling, the U.S. Supreme Court heard a case from Colorado that raised similar issues. In that case, called State v. Samuel Patane, the U.S. court ruled that when an officer fails to give a Miranda warning and a suspect points out a piece of physical evidence that the officer seizes, that physical evidence does not have to be suppressed. The U.S. court's ruling was 5-4, with Justice Clarence Thomas writing for the majority. Two days after issuing that ruling, the U.S. Supreme Court considered Knapp and sent it back to Wisconsin with instructions to reconsider in light of Patane.

Here is the background: On Dec. 12, 1987, Resa Scobie Brunner was found dead in her home. She had been beaten to death with a baseball bat. The chief suspect was Matthew Knapp, who had been with Brunner on the night of her death. The day after the murder, Detective Timothy Roets and another officer went to Knapp's home, the upper flat of a two-family house, to arrest him on a parole violation. Roets let himself into the building without knocking and climbed the stairs to the door of Knapp's apartment where he knocked, announced that Knapp's parole officer wanted him brought in, and requested that Knapp open the door. Knapp opened the door and told Roets that he was calling his attorney. Roets responded that Knapp had to come with him to the police station. Knapp told Roets that he needed his shoes, which were in his bedroom, and Roets followed Knapp to the bedroom. Without giving a Miranda warning, Roets began questioning Knapp about what he was wearing the night of Brunner's death. Knapp pointed to a sweatshirt, which Roets then seized.

At the station, Roets continued questioning Knapp without providing Miranda warnings. Roets did not inform Knapp that he was a suspect but instead told him that he wanted Knapp's help in finding the murderer. Roets later testified that he knew he should

[1] Justice Diane S. Sykes, who now sits on the federal Court of Appeals, dissented from this part of the decision.

have given a Miranda warning but did not because he feared that Knapp would stop talking.

Twelve years passed before the State charged Knapp with first-degree intentional homicide. In that time, Knapp confessed the crime to other people, and blood and DNA found on the sweatshirt linked him to Brunner. Prior to trial, Knapp asked the court to suppress the sweatshirt from evidence, arguing that it was obtained as the result of a Miranda violation. The circuit court denied the motion, but permitted Knapp to appeal that ruling to the Court of Appeals. The Court of Appeals certified the case to the Supreme Court, which, as noted, concluded that the sweatshirt must be suppressed from evidence. Knapp's trial still has not taken place. He remains incarcerated at Dodge Correctional Facility for other crimes.

In determining whether to allow the State to present the sweatshirt as evidence, the state Supreme Court examined two court decisions handed down in 2000, one from the Wisconsin Court of Appeals[2] and one from the U.S. Supreme Court[3]. The Wisconsin decision, known as Yang, said that, unlike statements, physical evidence such as the sweatshirt obtained through an intentional Miranda violation should not be automatically excluded from evidence. The U.S. decision, known as Dickerson, said the opposite. In Dickerson, the U.S. Supreme Court said that a Miranda warning is a constitutional right – meaning that not giving one is a violation of a person's Fifth Amendment right to due process. When police violate the Constitution to obtain evidence, that evidence is called "fruit of the poisonous tree" and may not be used in court.

While the Supreme Court majority in 2003 concluded that Yang was no longer valid law in light of Dickerson, the U.S. court's decision in Patane has changed the landscape. The state Supreme Court now will reconsider its decision in Knapp.

[2] State v. Yang, 2000 WI App 63
[3] Dickerson v. United States, 530 U.S. 428